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**BENCH STATEMENT**  
*NFIB v. Sebelius*, No. 11–393  
Joint Dissent

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Justices Scalia, Thomas, Alito, and I have written a Joint Dissent. In our view, the Act before us is invalid in its entirety.

The Joint Dissent is organized this way. First, it considers the constitutionality of the Individual Mandate. That, of course, requires a discussion of whether the Mandate can be sustained as a valid exercise of Congress' power to regulate interstate commerce or as an exercise of its power to tax. Second, the Joint Dissent considers the constitutionality of the expansion of Medicaid in light of the argument that it coerces States to surrender the power that must be vested in them under principles of federalism. Third, the Joint Dissent considers the question whether the Act's other provisions can be preserved if the Mandate and Medicaid Expansion are unconstitutional.

## INDIVIDUAL MANDATE

First, the Individual Mandate. The statute requires a defined class of individuals to purchase health insurance. This mandate is first defended by the Government as an exercise of Congress' power under the Commerce Clause. It is true that if an individual does not purchase insurance, he or she affects the insurance market to a degree. But the Government's theory would make one's mere existence the basis for federal regulation. There would be no structural limit on the power of Congress. As a result, the Government's theory would change the relation between the citizen and the Federal Government in a fundamental way.

We cannot accept the Government's theory. There are structural limits upon Congress' powers. In other words, there are some things the Federal Government cannot do. That clear principle carries the day here. It requires us to conclude that Congress' power to regulate interstate

commerce does not give it the authority to enact the Individual Mandate. This conclusion is supported by five Justices: The Chief Justice and the four Members of our Joint Dissent.

Despite the fact that Congress exceeded its power to regulate interstate commerce when it passed the Individual Mandate, a majority of the Court holds that the Individual Mandate if recast as a tax is constitutional. The Court unanimously concludes that the Individual Mandate is *not* a tax under the Anti-Injunction Act, but five members of the Court then pivot and hold that the Individual Mandate *is* a tax for constitutional purposes. And to do this, the majority rewrites the statute Congress wrote. We disagree.

The Act requires the purchase of health insurance and punishes violation of that mandate with a penalty. But what Congress called a “penalty,” the Court calls a *tax*. What Congress called a “requirement,” the Court calls an *option*. And where Congress mandates that the person

“shall” obtain insurance, the Court says he *may*, but need not, obtain insurance. In short, the Court imposes a tax when Congress deliberately rejected a tax.

Judicial tax-writing is a particularly troubling usurpation of the legislative role. It places the power to tax in the branch of government *least* accountable to the citizenry. But the Constitution requires taxes to originate in the House of Representatives, the legislative body *most* accountable to the people. There, elected officials must weigh the need for the tax against the terrible price they might pay at their next election. Imposing a tax through judicial legislation inverts the constitutional scheme. In the case of the Affordable Care Act, Congress went to great lengths to structure the mandate as a penalty, not a tax. But the majority now says that it is a tax—at least for the purpose of sustaining it, although not for purposes of jurisdiction.

## MEDICAID EXPANSION

The second part of our Joint Dissent considers the Medicaid Expansion. The Expansion provides new funds to the States for Medicaid. Its whole design is to threaten withdrawal of all of a State's federal funding for Medicaid if the State does not comply with the Expansion directive. In so doing, the Medicaid Expansion leaves States with no realistic choice but to expand Medicaid. It coerces them into administering a federal program against their will. That blurs the lines of political accountability between the States and their citizens. The coercion effected by the statute is a violation of state sovereignty. On this threshold question of coercion seven Justices agree.

Three Justices, however, devise a remedy that, again, in effect rewrites the statute and changes its design. In the separate opinion by Justice Ginsburg, joined by Justice Sotomayor, two other Justices conclude that the Medicaid Expansion is valid as written, but, in view of the disposition

of The Chief Justice, then agree with the remedy he adopts. The Joint Dissent disagrees. We find no judicial authority to rewrite the statute to permit this remedy. The design of the Court's remedy, contrary to the statute Congress enacted, is to bar the Federal Government from withdrawing *all* pre-existing Medicaid funding if a State elects not to participate in the Medicaid Expansion.

Once the specifics of today's ruling are understood, it will be apparent that the Affordable Care Act must now operate as the Court has revised it, not as Congress designed it. The consequences of that result are as follows.

The Court offers States a choice where Congress wanted them to have no choice. And to make matters worse, the choice the Court offers may be illusory. That is because, even if a State elects not to accept the Expansion, its citizens are still subject to the Individual Mandate—now recast as a tax. But now in those States the cost of the insurance that must be purchased may well be far higher,

for insurance companies have no Medicaid Expansion to help defray the cost of insuring unhealthy individuals at unprofitable rates. This distorted version of the Act is now decreed by the Court and no one else. It is the position of the Joint Dissent that the Medicaid Expansion cannot be saved in this way and that the Expansion must be declared invalid.

### SEVERABILITY

The third and final part of our Joint Dissent considers what to do with the remainder of the Act if the Individual Mandate and Medicaid Expansion are unconstitutional. In our view, both these provisions are central to the Act's design and operation, and all the Act's other provisions would not have been enacted without them. It must follow that the entire statute is linked together, and without the Mandate and Medicaid Expansion, the entire Act is inoperative.

The Joint Dissent addresses this question of severability for two reasons. First, it is necessary for us to address severability in order to support the conclusion that, in our view, the Act is invalid in its entirety. Second, our analysis of the Act's many interdependencies gives further support for our conclusion that the Court's Medicaid remedy is itself inconsistent with the Act. The analysis in the severability part of the Joint Dissent makes clear that what the Court has done is to force on the Nation a new Act so that the health-care system is now governed by what the Court has said, not what the Congress has said.

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The fundamental problem with the Court's approach to the case is this: It saves a statute Congress did not write. The Court regards its strained statutory interpretation as judicial modesty. It is not. It amounts instead to a vast judicial overreaching. It creates a debilitated, inoperable



version of health-care regulation that Congress did not enact and the public does not expect.

The Court's disposition, invented and atextual as it is, does not even have the merit of avoiding constitutional difficulties. It creates them. The judgment on the Medicaid Expansion issue ushers in new federalism concerns and places an unaccustomed strain upon the Union. Those States that decline the Medicaid Expansion must subsidize, by the federal tax dollars taken from their citizens, vast grants to the States that accept the Medicaid Expansion. If that destabilizing political dynamic, so antagonistic to a harmonious Union, is to be introduced at all, it should be by Congress, not by the Judiciary.

The values that should have determined our course today are caution, minimalism, and the understanding that the Federal Government is one of limited powers. But the Court's ruling undermines those values at every turn. In the name of restraint, it overreaches. In the name of

constitutional avoidance, it creates new constitutional questions. In the name of cooperative federalism, it undermines state sovereignty.

We must submit, with due respect, that today's decision somehow overlooks this Court's historic role and responsibility to teach, to confirm, to insist upon this proposition: The Constitution, though it dates from the founding of the Republic, does and always must have powerful meaning and vital relevance in the context of our own times. This case presents real questions regarding the structure of the Constitution. Some may think a case concerning constitutional structure, with issues concerning checks and balances, separation of powers, and federalism, is somehow of lesser importance or priority than a case concerning liberties guaranteed in the Bill of Rights and the Civil War Amendments. But structure means liberty. For without structure there are insufficient means to hold to account a central government that exceeds its powers in

controlling the lives of its citizens. Today's decision should have vindicated, not ignored, these precepts.

For the reasons here stated, we would find the Act invalid in its entirety. With respect, we dissent.